

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 134 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgement?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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SHAHIBHAG KAMALKUNJ CO.OP. HOUSING SOCIETY LIMITED

Versus

TIRUPATI CORPORATION  
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Appearance:

MR PV NANAVATI for Petitioners

MR IM BENGALI for Respondent No. 1  
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CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 15/12/2000

ORAL JUDGEMENT

The present Revision Application has been filed by the original defendants challenging the order passed by the Chamber Judge, City Civil Court, Ahmedabad in Summary Suit No.5073 of 1989 by which conditional leave to defend the suit is granted to the defendants on

condition of depositing Rs.1,00,000/-.

The respondent-plaintiff instituted the aforesaid Summary Suit for recovery of Rs.9,09,000/- against the defendants on the allegations that since the previous contractor abandoned the construction of the tenements of the Society, the Society invited tenders for the construction of the said tenements for the said Cooperative Society. The plaintiff's tender was accepted for the construction of the building. That the construction was carried out by the plaintiff and the bills were checked by Society's Architect and Engineer and the same were approved. That during the construction work, the defendant No.1 Cooperative Society instituted Civil Suit No.4185 of 1985 in the Small Causes Court, Ahmedabad, wherein Court Commissioner was appointed and temporary order of status quo was granted. During that period, the members of the Society started living in the tenements.

It is also the case of the plaintiff that in view of the aforesaid approved bills of Rs.10,43,948.60 Ps., 10% of the amount is to be retained by the defendant No.1 till the construction work is checked by the Engineer. Some amount was also required towards deposit as earnest money and security deposit. After deducting certain amount, ultimately, the claim of Rs.11,69,948.68 was found due and payable as per the say of the plaintiff in the plaint.

According to the plaintiff, he gave credit of Rs.5,85,480/- towards the cement supplied by the defendant No.1 Society and, therefore, the plaintiff is entitled to get Rs.5,84,468.68 against the defendants. The plaintiff has also claimed interest at the rate of 18% per annum on the aforesaid amount.

The suit was filed for total amount of Rs.9,09,000/-, which includes claim of Rs.5,84,468.68 plus Rs.3,24,380.12 which is the amount of interest plus Rs.151.20 as notice charges.

Having received the summons of the said suit, the defendants filed an application for leave to defend. It was contended that the suit is not maintainable, that the plaintiff is not a registered firm under the Indian Partnership Act and the claim is false and frivolous, that the plaintiff, Architect and Contractor have colluded with each other and the certificate issued is a false certificate. It was also contended that the claim of Rs.3,24,380.12 on account of interest is absolutely

untenable and that there was no such agreement to pay interest between the parties.

The learned Chamber Judge, by the impugned order, granted conditional leave to the defendant to defend the suit on depositing Rs.1,00,000/- within a period of four weeks from the date of the order. The aforesaid order has been challenged in the present revision application.

This Court, while admitting the revision application as back as on 10th February, 1997, had granted interim order staying condition regarding deposit of Rs.1,00,000/-. This Court while admitting the matter also clearly observed that the further proceedings of the suit is not stayed and the trial court was permitted to proceed with the suit in accordance with law.

Today, this matter has reached for final hearing. At the time of hearing of this Revision Application, it was argued by Mr.P.V. Nanavati for the petitioner that provisions of Order 37 Rules 2 and 3 of the C.P.C. are not applicable looking to the prayer in the suit. He has relied upon the judgment of this Court reported in The National Textile Corporation, Ahmedabad v. Shri Rajendra Sankalchand and Parikh, 1982 G.L.H. (U.J.) 7. This Court has taken the view that if the suit is filed to recover a particular amount comprising of price of goods sold and delivered as well as interest, in such case, the plaintiff relying on custom of the Trade to charge such interest will have to prove his case by evidence in order to succeed in getting the amount of interest and hence, in such type of suits, unconditional leave to defend the suit should have been granted. It was argued by Mr.Nanavati that since the amount in question involves amount towards interest and since the defendants have denied any such agreement about interest, at least, there is a triable issue and in that view of the matter, the learned trial Judge ought to have granted unconditional leave to defend the suit. Considering the aforesaid submission and in view of the fact that there is a serious dispute about the liability on the part of the defendants to pay interest which is claimed in the suit, according to me, this is a fit case in which unconditional leave to defend the suit should have been granted to the defendants. In view of the decision of this Court, as quoted above, when there is a dispute about payment of interest, it will raise a triable issue and in such cases, normally, unconditional leave to defend the suit should have been granted. Considering the aforesaid proposition of law laid down by this Court coupled with the fact that since 1997, the impugned order

is stayed by this Court and liberty was given to the trial court to proceed with the suit, I deem it fit to allow this Revision Application by granting unconditional leave to defend the suit in favour of the defendants.

In view of the aforesaid, this Revision Application is allowed. The defendants are permitted to defend the suit unconditionally and the impugned order by which they were asked to deposit Rs.1,00,000/- as a condition precedent to defend the suit is quashed and set aside. If the written statement is not filed so far, the same may be filed by the defendants on or before 31st January, 2001. Since the suit is of 1989, the trial court is directed to expedite and to dispose of the same on its own merits preferably by 31st December, 2001.

Rule is accordingly made absolutely with no order as to costs.

15th December, 2000 ( P.B. Majmudar, J. )

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(apj)